UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NORTHWEST AIRLINES, INC.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-385-P-H***
	)	
ALLYN J. CARUSO, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff, a major national airline, invokes the court's diversity jurisdiction to assert a fraud claim against the two principals of a pair of regional airlines that operated connecting flights for the plaintiff. The complaint was originally filed in the District Court for the District of Minnesota, which transferred the case here pursuant to 28 U.S.C. § 1404(a). *See* Order (Docket No. 1c). A third defendant, David M. Hulick, served as chief financial officer of the regional carriers. He has reached a settlement agreement with the plaintiff and, accordingly, the court has entered a judgment against him pursuant to Fed. R. Civ. P. 54(b). *See* Judgment (Docket No. 36). The defendants originally asserted counterclaims for fraud but have stipulated to their dismissal (Docket No. 9). The two remaining defendants — Allyn J. Caruso and John Gallichon (hereinafter "the defendants") — now move for summary judgment (Docket No. 16). For the reasons that follow, I recommend that the motion be **DENIED**.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

To facilitate the evaluation of summary judgment motions under the foregoing standards, the Local Rules of the court require parties to file certain materials with their legal memoranda. Specifically, the moving party must furnish "a separate, short and concise statement of material facts, supported by appropriate record citations, as to which the moving party contends there is no genuine issue to be tried." Loc. R. 56. Similarly, the opponent of a summary judgment motion must also provide a factual statement with record citations, pointing to contested issues of fact that require trial.

Id.

The parties here have chosen to complicate the court's task by deviating from these requirements. The plaintiff has filed two separate factual statements — one listing factual issues it regards as *not* in dispute (Docket No. 21) and the other a series of objections to the defendants' factual contentions. The defendant, in turn, filed with their reply memorandum a "Statement of Facts in Opposition to Plaintiff's Statement of Facts Not in Dispute" (Docket No. 27) and a "Supplemental Statement of Material Facts Not in Dispute" ("Defendants' Supplemental SMF") (Docket No. 28). Correctly pointing out that the rules do not provide for such supplemental factual statements, and noting the unfairness of permitting a moving party a second opportunity to establish the lack of factual issues for trial, the plaintiff moves to strike the Supplemental Statement (Docket No. 30).

The plaintiff's motion to strike the document filed as Docket No. 28 is granted. Summary judgment practice, fundamental to civil litigation and substantially similar in all Maine courts, *compare* Local Rule 56 *with* M.R. Civ. P. 7(d), is designed to divert non-trialworthy issues from the path to a full-blown trial. This is accomplished by giving the moving party an opportunity to establish the lack of factual disputes and the non-moving party the opportunity to respond by demonstrating to the court that factual controversies exist and that a trial is thus necessary. Deviations from this orderly scheme are not just unhelpful but risk outcome-determinative consequences.[1] *See Pew v. Scopino*, 160 F.R.D. 1, 1 (D.Me. 1995) ("The parties are bound by their

[1] The defendant contends it should be entitled to a second round of factual assertions because the depositions of defendant Gallichon and the plaintiff's "damages personnel" took place after the filing of the summary judgment motion but before the plaintiff responded in opposition, this giving the plaintiff the opportunity to make use of these materials. Defendants' Supplemental SMF at 1. This is completely unpersuasive. Gallichon could easily have aided his own cause at any point, as necessary, by executing an affidavit in support of his side's position on the summary judgment motion. Moreover, as previously noted in this proceeding, Gallichon's deposition was originally

[Local Rule 56] Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein.") Consistent with this principle, I simply have not credited any factual assertions that do not appear in two statements duly filed pursuant to Local Rule 56 — wherever else they happen to appear.

II. Factual Context

The record, when viewed in the light most favorable to the plaintiff as the non-moving party, reveals the following: The plaintiff, a Minnesota corporation with its principal place of business in that state,

> is a worldwide passenger and cargo air carrier. As a part of its business, Northwest enters into airline service agreements with regional airlines, commonly known as "airlink carriers." The airlink carriers operate connecting flights to destinations not served by Northwest. Such arrangements permit Northwest and the airlink carriers to offer destinations not available in the individual carrier's system. Tickets may be purchased from either Northwest or the airlink carriers. Revenue and expenses are generally divided among the airlines pursuant to an agreed-upon formula. The flights operated by the airlink carrier are displayed in airline computer reservation systems under the two letter Northwest designator code: "NW." Hence, reservations for such travel are booked as NW flights. Passengers receive certain benefits . . . when traveling on such code sharing flights, and the airlink carrier receives the identity and recognition of being associated with a major international airline.

Complaint (Docket No. 1a) at ¶¶ 1, 7; Answer (Docket No. 1b) at ¶¶ 1, 2; Defendants' Statements of Facts Not in Dispute for Purposes of Summary Judgment ("Defendant's SMF") (Docket No. 17) at ¶ 1 (noting that paragraphs 7-8 and 14 of Complaint "accurately summarize[]" the contractual

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scheduled for February 10, 1998 — well in advance of the original motion deadline — and, when he failed to appear on that date, it was the *plaintiff* that expressed concern as to the impact on the summary judgement proceedings. *See* Report of Hearing and Order Re: Discovery Disputes (Docket No. 8) at 1-2. Further, when a party believes that the timing of discovery works any prejudice in complying with the motion deadline, the appropriate remedy is to seek the modification of the scheduling order. Here, the court extended the motion deadline, during a hearing in chambers, on March 31, 1998, in part to permit Gallichon to be deposed.

relationship at issue). Northeast Express Regional Airlines ("NERA") and Precision Valley Aviation, Inc. ("Precision") had such an airlink carrier relationship with the plaintiff and served destinations in the northeastern region of the country.[2] Affidavit of John O. Klinkenberg ("Klinkenberg Aff.") (Docket No. 23) at ¶ 2. At all relevant times, Caruso was the president, chief executive officer and chairman of NERA and Precision. Complaint at ¶ 10; Answer at ¶ 4. He owned 100 percent of NERA and 80 percent of Northeast Air Group, which owned 100 percent of Precision. Complaint at ¶ 10; Answer at ¶ 4. Gallichon, who owned 20 percent of Northeast Air Group, was executive vice president of Precision and NERA. Complaint at P11; Answer at ¶ 4. Hulick was chief financial officer of NERA and Precision. Complaint at ¶ 12; Answer at ¶ 4.

The plaintiff had a written "Airline Services Agreement" with both NERA and Precision. Klinkenberg Aff. at ¶ 2 and Exhs. A & B thereto. Pursuant to these agreements, and based on the agreed-upon revenue-sharing formula, each week Precision and NERA sent statements of estimated prorated revenues to the plaintiff's offices in Minnesota along with requests for wire transfer of funds due. *Id*. at ¶ 3. Thereafter, Precision and NERA submitted the actual flight coupons to the plaintiff in Minnesota. *Id*. at ¶ 8. The plaintiff reviewed the flight coupons and compared the actual revenue with the estimates contained in the wire transfer requests, generally not making adjustments for small discrepancies. *Id*. The wire transfer requests were supposed to be based on a sample of the flight coupons collected by NERA and Precision, multiplied by the actual number of passengers transported by the airlink carriers. *Id*. at ¶ 5.

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[2] The parties' factual statements do not establish where NERA and Precision were headquartered or had offices. The defendants contend in their memorandum of law that Caruso worked out of an office maintained by NERA in Maine and Gallichon had his base at an office in New Hampshire maintained by Precision. Defendants' Memorandum of Law in Support of Summary Judgment (Docket No. 16) at 2.

Beginning in 1992, Hulick intentionally altered some of the data submitted by NERA and Precision to the plaintiff, both as to amounts collected and numbers of passengers. Deposition of David M. Hulick ("Hulick Dep."), Exh. A to Motion for Summary Judgment and appended memorandum of law (Docket No. 16), at 12-13. This resulted in overpayments by the plaintiff to NERA and Precision of nearly $3 million. Klinkenberg Aff. at ¶ 11. Hulick did this on his own, without informing Caruso or Gallichon. Hulick Dep. at 41.

The plaintiff did not discover there were any problems with the payments until March 1994, when it conducted an audit in response to a request from NERA and Precision to consider a proposed corporate "restructuring plan."[3] *Id*. at 16-17; Klinkenberg Aff. at ¶ 9. Confronted with the discrepancies, Hulick explained to the plaintiff's auditors that the data changes he had made did not affect the sums due to the plaintiff but involved only adjustments as between NERA and Precision. Klinkenberg Aff. at ¶ 10; Deposition of Diane Martell ("Martell Dep.") at 22-23; Deposition of Betsy Sagnes ("Sagnes Dep.") at 9.

Hulick wrote an account of what he had done, went to Caruso and Gallichon, gave them the document and informed them that he had "taken it upon [him]self to hedge the numbers a little bit over time." *Id*. at 17-19. Hulick made an offer to his two superiors to confess his misdeeds to Northwest and to accept responsibility for them. *Id*. at 17-18. Hulick also offered his resignation. Deposition of John Gallichon ("Gallichon Dep.") at 43.

Gallichon instructed Hulick to stop the practice of altering the figures being submitted to the plaintiff, but he also told Hulick to destroy the incriminating document he had prepared. Hulick

[3] A letter dated February 1, 1994 from Gallichon to an official of the plaintiff describes a proposed "debt for equity swap" that would have involved approximately $6.7 million owed by NERA and precision. Exh. 20 to Gallichon Dep. at 1.

Dep. at 19-20. Hulick did so. *Id*. at 20. Caruso, who was present for this conversation, made no comment. *Id*. Having been assured by Gallichon that he would take care of the problem, Hulick said nothing further to the plaintiff's auditors. *Id*. at 24. Gallichon never revealed what Hulick told him to anyone, other than Caruso and possibly their attorneys, until Gallichon was deposed in April 1998. Gallichon Dep. at 47. Throughout the audit process, Hulick continued to insist in any communications with representatives of the plaintiff that any discrepancies uncovered by the auditors had a legitimate explanation. Klinkenberg Aff. at ¶ 12.

Precision and NERA actually took the position in discussions with the plaintiff that the two airlink carriers were owed money by the plaintiff rather than vice versa. Gallichon Dep. at 30-33. The plaintiff continued to investigate the discrepancy, a time-consuming process that involved reviewing every ticket coupon submitted to the plaintiff by NERA and Precision. Klinkenberg Aff. at ¶ 11. As the audit process continued, Hulick continued to insist that any discrepancies had a legitimate basis. *Id*. at ¶ 12. In addition, NERA and Precision took the position that they had actually been underpaid by the plaintiff for certain other items. *Id*. The two sides negotiated and the plaintiff agreed to reduce its claim against the two airlink carriers by approximately $600,000. *Id*. The plaintiff also continued to pay NERA and Precision under the regular revenue accounting process that had been established between them. *Id*.

The court is aware, although the matters of record cited in the parties' respective factual statements do not establish, that NERA and Precision filed petitions in bankruptcy on May 28, 1994 in the Bankruptcy Court for the District of Maine.

III. Discussion

a. Statute of Limitations

The first issue raised by the summary judgment motion concerns the applicable statute of limitations. The defendants urge the court to apply the applicable three-year limitation period from New Hampshire law, *see* N.H. Rev. Stat. Ann. § 508:4 (governing "all personal actions, except actions for slander or libel"), and the plaintiff does not contest the assertion that such a determination would bar its fraud claim. However, the plaintiff contends that the appropriate limitation period is six years, pursuant to Minnesota law, s*ee* Minn. Stat. Ann. § 541.05(6) ("[f]or relief on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud"), which would not leave its fraud action time-barred. The plaintiff is correct.

The Supreme Court has made clear that the transfer of a diversity case between districts pursuant to 42 U.S.C. § 1404(a) cannot affect what law ultimately applies to the case. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (noting that a section 1404(a) venue change "generally should be, with respect to state law, but a change of courtrooms"); *see also Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990) (reaffirming *Van Dusen* and applying its rule to plaintiff-initiated transfers); *accord Allied Investment Corp. v. KPMG Peat Marwick*, 872 F.Supp. 1076, 1083 (D.Me. 1995) (citation omitted). The rule could not be simpler: This court must "apply the law of the transferor court." *Ferens*, 494 U.S. at 523. It is also clear that if this case were being heard in the District of Minnesota, that court would apply the principles from Minnesota law that (1) "'statutes of limitations relate to remedy' and therefore are procedural," and, therefore, (2) "the period of time after accrual within which a party may bring the action is controlled by Minnesota law." *Nesladek v. Ford Motor*

Co., 46 F.3d 734, 736-37 (8th Cir. 1995) (quoting *United States Leasing Corp. v. Biba Information Processing Servs., Inc.*, 436 N.W.2d 823, 826 (Minn.App. 1989)); *see also Fredin v. Sharp*, 176 F.R.D. 304, 308 (D.Minn. 1997) (same).

b. Laches

For similar reasons, the defendants cannot maintain a laches defense. It is an established principle of Minnesota law, at least in cases where arbitration is an issue, that laches is a "procedural issue" that should nevertheless be decided by the arbitrator and not the court. *See City of Morris v. Dunnick Brothers, Inc.*, 531 N.W.2d 208, 210 (Minn.App. 1995) (noting that such "procedural issues are often intertwined with the substantive dispute intended for arbitration") (citation omitted). The defendants offer the court no authority to contest the plaintiff's assertion that this principle of arbitration law can be extrapolated to the more general proposition that laches is procedural rather than substantive for choice-of-law purposes in Minnesota. Instead, the defendants rely on *Aronovich v. Levy*, 56 N.W.2d 570 (Minn. 1953) to assert that they may still raise a laches defense under Minnesota law because they are "innocent defendants." Defendants' Reply Memorandum to Plaintiff's Memorandum in Opposition to Defendant's [sic] Motion for Summary Judgment ("Reply Memo") (Docket No. 29) at 5. To the contrary, the rule stated in *Aronovich* is that, "where only strictly legal rights are in controversy, no neglect in asserting the right, short of the time prescribed by the statute of limitations, will bar the appropriate legal remedy." *Id*. at 574 (clarifying, however, that a party seeking equitable remedies in an otherwise legal action may be subject to laches defense). The plaintiff here seeks only damages, a strictly legal remedy. There is thus no basis for asserting a laches defense to the plaintiff's fraud claim under Minnesota law. I conclude that the

Aronovich rule is applicable because I discern no reason to question the premise that the issue falls on the procedural side of the procedure-versus-substance distinction that is the first step in a Minnesota choice-of-law inquiry. *See Nesladek*, 46 F.3d at 736 (citations omitted).

c. Substantive Issues

Finally, the defendants contend they are entitled to summary judgment because the plaintiff cannot satisfy the elements of fraud under either Minnesota or New Hampshire law. I disagree.[4]

Under Minnesota law, "intentional misrepresentation" is actionable if a defendant

> (1) made a representation (2) that was false (3) having to do with a past or present fact (4) that is material (5) and susceptible of knowledge (6) that the representor knows to be false or is asserted without knowing whether the fact is true or false (7) with the intent to induce the other person to act (9) in reliance on the representation.

M.H. v. Caritas Family Servs., 488 N.W.2d 282, 289 (Minn. 1992). The plaintiff must also prove that it suffered damages "attributable to the misrepresentation." *Id*. "A misrepresentation may be made either (1) by an affirmative statement that is itself false or (2) by concealing or not disclosing certain facts that render the facts that are disclosed misleading." *Id*.

In New Hampshire, the tort of "deceit" requires the plaintiff to prove

> that the defendant [or defendants] intentionally made material false statements to the plaintiff, which the defendant [or defendants] knew to be false or which [the defendant or defendants] had no knowledge or belief were true, for the purpose of causing, and which does cause, the plaintiff reasonably to rely to [its] detriment.

Walker v. Percy, 702 A.2d 313, 317 (N.H. 1997) (citation omitted); *see also Snow v. American*

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[4] Accordingly, it is not necessary to consider the extensive choice-of-law analysis presented by the parties. No party contends that the law of some other jurisdiction beyond Minnesota or New Hampshire applies. The plaintiff asserts that Minnesota law applies, that there is no basis for invoking New Hampshire law, and that the defendants have implicitly conceded that they are not entitled to summary judgment under Minnesota's fraud principles. The latter contention is not, in my view, an accurate characterization of the defendants' position.

Morgan Horse Assn., Inc., 686 A.2d 1168, 1170 (describing tort as "fraud" and requiring proof of elements by "clear and convincing evidence").

According to the defendants, the plaintiff's fraud claim fails under either jurisdiction's formulation of the tort because the only misrepresentations at issue were made by Hulick rather than them. I agree that the summary judgment record yields no genuine issue of material fact as to whether the defendants made any misrepresentations prior to the point in March 1994 when Hulick went to the defendants and told them he had been altering the data being submitted to the plaintiff on behalf of NERA and Precision. I also agree that the summary judgment record establishes that the defendants made no affirmative misstatements of fact to the plaintiff thereafter concerning Hulick's dishonest acts. The question thus becomes whether, in these circumstances, the law of Minnesota and/or New Hampshire imposes upon the defendants a duty to correct the affirmative misrepresentations previously made by Hulick.

The law in Minnesota is that

> [a] party does not commit fraud by failing to disclose facts except in certain special circumstances such as: when a confidential or fiduciary relationship exists; when disclosure is necessary to clarify misleading information already disclosed; or, when one party has "special knowledge" of material facts to which the other party does not have access.

American Computer Trust Leasing v. Boerboom Int'l, Inc., 967 F.2d 1208, 1211-12 (8th Cir. 1992) (citing *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989)). The plaintiff does not contend that it was in a confidential or fiduciary relationship with the defendants. Rather, the plaintiff's position is that disclosure by the defendants was necessary to clarify the misleading information already disclosed by Hulick.

I agree with the plaintiff that, assuming Minnesota law is applicable, a reasonable factfinder

could conclude the defendants violated a duty to disclose in such a situation. The "necessary to clarify information already disclosed" basis for liability, as adverted to by the Minnesota Supreme Court in its *Airco* decision, is derived from the *Restatement (Second) of Torts*. *See Airco*, 446 N.W.2d at 380 (citing *Restatement (Second) of Torts* § 551). The *Restatement* drafters, in turn, explain that

> [o]ne who, having made a representation which when made was true or believed to be so, remains silent after he has learned that it is untrue and that the person to whom it is made is relying upon it in a transaction with him, is morally and legally in the same position as if he knew that his statement was false when made.

Restatement § 551 cmt. h. The situation here is a slight variation on the theme, because it was Hulick and not the defendants who made the initial representation. Given that the defendants instructed Hulick to make no disclosure of the misrepresentation to the plaintiff and to destroy the incriminating document he had prepared, my view is that the defendants assumed the moral and legal responsibility described by the *Restatement* drafters as the basis for tort liability under the principle adopted by the Minnesota Supreme Court.

Analyzing the problem under New Hampshire law yields the same result. Absent "some relation of trust and confidence between the parties," the New Hampshire Supreme Court has described a "duty to speak" that may "arise from the circumstances." *Smith v. Pope*, 176 A,2d 321, 324 (N.H. 1961) (quoting *Benoit v. Perkins*, 104 A. 254, 256 (N.H. 1918)). Thus, "[o]ne who makes a representation that is true when made is under a duty to correct that statement if it becomes erroneous or is discovered to have been false before the transaction is consummated." *Bursey v. Clement*, 387 A.2d 346, 348 (N.H. 1978) (citations omitted). As noted in connection with the discussion of Minnesota law, it is my view that the particular circumstances presented here are such that the initial representation made by Hulick and later determined by the defendants to be untrue, can be imputed

to the defendants.

The defendants next contend they are entitled to summary judgment because the plaintiff could not have reasonably relied on any misrepresentation the law might impute to them. The plaintiff characterizes the question of reliance as a disputed factual issue for trial. I agree with the plaintiff that, viewed in the requisite plaintiff-favorable light, the record establishes that it relied on Hulick's representations (as effectively adopted by the defendants) by continuing to conduct what was essentially business as usual with the two airlink carriers. Obviously, a less generous factfinder could determine that the plaintiff should have been more attentive to the matters at issue and more aggressive in pursing the audit so that it would have become independently aware of Hulick's fraud at some earlier point. But to the extent the plaintiff must prove it reasonably relied on any false representations,[5] the issue is not amenable to resolution at the summary judgment stage.

Finally, the defendants contend that they cannot be liable under any theories of vicarious liability. The court need not take up this subject because the plaintiff does not rely on vicarious liability in seeking to move the case to the trial stage.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' summary judgment motion be **DENIED**.

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[5] It is clear that reasonable reliance is an element of the tort of fraud in Minnesota, but I venture no opinion as to whether that is so in New Hampshire. The New Hampshire cases cited for the proposition by the defendants are inapposite. *See Labbe v. Labbe*, 623 A.2d 1320, 1321-22 (N.H. 1993) (discussing fraud or misrepresentation in divorce context); *Dartmouth Motor Sales, Inc. v. Wilcox*, 517 A.2d 804, 806 (N.H. 1986) (discussing issues relating to good-faith purchasers under Uniform Commercial Code).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this ___th day of July, 1998.

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David M. Cohen
United States Magistrate Judge